Appeal No. 19-AP-559

SUPREME COURT OF WISCONSIN

LEAGUE OF WOMEN VOTERS OF WISCONSIN,
DISABILITY RIGHTS WISCONSIN INC.,
BLACK LEADERS ORGANIZING FOR COMMUNITIES,
GUILLERMO ACEVES, MICHAEL J. CAIN,
JOHN S. GREENE, and MICHAEL DOYLE, in his
official capacity as Clerk of Green County, Wisconsin

Plaintiffs-Respondents,

v.

TONY EVERS, in his official capacity
as Governor of the State of Wisconsin

Defendant-Respondent,

and

THE WISCONSIN LEGISLATURE,

Intervening Defendant-Appellant.

On Appeal from the Circuit Court for Dane County
The Honorable Richard G. Niess, Presiding
Circuit Court Case No. 19-CV-84

BRIEF OF PLAINTIFFS-RESPONDENTS

(Counsel listed on inside cover)

Jeffrey A. Mandell (State Bar No. 1100406)
Kurt M. Simatic (State Bar No. 1083460)
STAFFORD ROSENBAUM LLP
222 West Washington Avenue, Suite 900
Post Office Box 1784
Madison, Wisconsin 53701-1784
jmandell@staffordlaw.com
ksimatic@staffordlaw.com
608.256.0226

Deana K. El-Mallawany*
Ben Berwick*
THE PROTECT DEMOCRACY PROJECT, INC.
125 Walnut Street, Suite 202
Watertown, MA 02472
deana.elmallawany@protectdemocracy.org
ben.berwick@protectdemocracy.org
202.579.4582

Lawrence S. Robbins*
Carolyn Forstein*
Wendy Liu*
ROBBINS, RUSSELL, ENGLERT, ORSECK,
UNTEREINER & SAUBER LLP
2000 K Street NW, 4th Floor
Washington, DC 20006
lrobbins@robbinsrussell.com
cforstein@robbinsrussell.com
wliu@robbinsrussell.com
202.775.4500

Attorneys for Plaintiffs-Respondents

* Admitted *pro hac vice*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Wisconsin Constitution and Statutes

Wisconsin Legislative Materials

Other Authorities

CONSTITUTIONAL AND STATUTORY PROVISIONS IMPLICATED

Wis. Const. art. IV, § 7:

> Each house shall be the judge of elections, returns and qualifications of its own members; and a majority of each shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may compel the attendance of absent members in such manner and under such penalties as each house may provide.

Wis. Const. art. IV, § 11:

> The legislature shall meet at the seat of government at such time as shall be provided by law, unless convened by the governor in special session, and when so convened no business shall be transacted except as shall be necessary to accomplish the special purposes for which it was convened.

Wis. Stat. § 13.02:

> **Regular sessions.** The legislature shall meet annually.
>
> **(1)** The legislature shall convene in the capitol on the first Monday of January in each odd-numbered year, at 2 p.m., to take the oath of office, select officers, and do all other things necessary to organize itself for the conduct of its business, but if the first Monday of January falls on January 1 or 2, the actions here required shall be taken on January 3.
>
> **(2)** The regular session of the legislature shall commence at 2 p.m. on the first Tuesday after the

8th day of January in each year unless otherwise provided under sub. (3).

(3) Early in each biennial session period, the joint committee on legislative organization shall meet and develop a work schedule for the legislative session, which shall include at least one meeting in January of each year, to be submitted to the legislature as a joint resolution.

(4) Any measures introduced in the regular annual session of the odd-numbered year which do not receive final action shall carry over to the regular annual session held in the even-numbered year.

COUNTER-STATEMENT OF ISSUES FOR REVIEW[1]

1. Did the Wisconsin Legislature convene the December 2018 Extraordinary Session "at such time as shall be provided by law," as required by Article IV, Section 11 of the Wisconsin Constitution?

2. Did convening the December 2018 Extraordinary Session by majority vote of each house's organizing committee violate the quorum requirement in Article IV, Section 7 of the Wisconsin Constitution?

3. Did the circuit court erroneously exercise its discretion by granting the temporary injunction?

Answers below: The circuit court held that the December 2018 Extraordinary Session violated both constitutional provisions; it accordingly enjoined enforcement of actions taken during that session. (B-App001-016[2]) The court of appeals stayed the circuit court's temporary injunction pending review on the merits. (B-App017-025) This Court granted bypass and took jurisdiction over the appeal.

---

[1] The Legislature's framing of the issues for review does not identify the central disputes in this case. (Br. at 1) The Court should analyze the issues as presented above. It accepted issues 1-2 in granting the Petition for Bypass, and issue 3 follows the Legislature's Docketing Statement for this appeal.

2 "B-App___" refers to pages in the Appendix to Petition for Bypass. "L-App__" refers to the Appendix filed with the Legislature's opening brief.

INTRODUCTION

This case is about fidelity to the Constitution. "In theory the sovereign political power of the state rests in the people; in practice, however, it is exercised by" officials, "who must proceed in the manner indicated by the constitution." *State ex rel. LaFollette v. Kohler*, 200 Wis. 518, 547-48, 228 N.W. 895 (1930). To protect against "the tyranny of legislation," the Constitution includes specific constraints on the Legislature. *Views of "K"—No. 2*, Madison Express (Mar. 26, 1846), reprinted in *The Movement for Statehood 1845-1846* at 146 (Milo M. Quaife ed., 1918). Under one such constraint, the Legislature can "meet" of its own accord only at a "time … provided by law." Wis. Const., art. IV, § 11.

Rather than heed this clear constraint imposed by the people, the Legislature has—contrary to the Constitution—claimed for itself the power to meet whenever it wants. The Legislature also insists that its internal work schedule grants a handful of legislators, far short of a quorum in either house, authority to convene the Legislature in unscheduled

"extraordinary sessions" (an apt and revealing term invented by the Legislature).

When called to account for the dissonance between its conduct and the Constitution, the Legislature insists that the judiciary—a co-equal branch—lacks authority to ensure adherence to the Constitution's limits on legislative power. And it dismisses this lawsuit as privileging "nomenclature" over "substance." (Br. at 17) It ignores the fact that its *post hoc* rationalization for the December 2018 Extraordinary Session distorts constitutional and statutory text alike, is rife with contradictions, and inescapably leads to absurd consequences.

The circuit court saw through the Legislature's tactics. The court correctly recognized that the Constitution's plain text bars the Legislature from meeting other than at a "time… "provided by law." Because no statutory provision authorized the Legislature to meet in the December 2018 Extraordinary Session, the court appropriately held that session unlawful. That determination, and the resulting injunction, should be affirmed.

COUNTER-STATEMENT OF THE CASE

A. Legal Background

Through the Constitution, the people of Wisconsin granted their Legislature limited power. Unless convened by the Governor in special session, the Legislature has authority to "meet" only at "such time as shall be provided by law." Wis. Const. art. IV, § 11. Pursuant to that provision, the first year after ratification, the Legislature enacted a single statute, since renumbered Wis. Stat. § 13.02, providing when the "regular annual session of the legislature shall commence." *See* Wis. Stat. ch. 8, § 1 (1849). No statute grants the Legislature the broad authority to convene itself in extraordinary session on its own initiative.

Wis. Stat. § 13.02 is the only law authorizing general-business legislative meetings. As defined by its title and stated in its text, the statute addresses "Regular sessions." It begins with a simple declaration: "The legislature shall meet annually." Wis. Stat. § 13.02. It elaborates on that premise in four subsections:

- Subsection (1) directs when the Legislature "shall convene" to "organize itself for the conduct of its business."

- Subsection (2) decrees when the "regular session" (also the title of the statute) "shall commence" "each year unless otherwise provided under sub. (3)."

- Subsection (3) instructs a legislative committee to "develop," "[e]arly in each biennial session period," "a work schedule … which shall include at least one meeting in January of each year."

- Subsection (4) provides that "measures introduced in the regular annual session of the odd-numbered year … carry over to the regular annual session held in the even-numbered year."

B. December 2018 Extraordinary Session

The regular session ended in March 2018, and the Legislature adversely disposed of all remaining proposals. *See* Assembly Journal, 103rd Reg. Sess., at 917; Senate Journal, 103rd Reg. Sess., at 881. Accordingly, the next regular-session meeting of the Legislature would occur in January 2019.

On Friday, November 30, 2018, the Assembly Committee on Assembly Organization and the Senate Committee on Senate Organization each voted to convene an extraordinary session. (B-App036) Because the Organizing Committees comprise only a few members from their

respective houses, their decisions to convene the Legislature violated the Constitution's quorum requirement. Wis. Const. art. IV, § 7. Their decisions also violated Article IV, Section 11 because there was no law providing for the Legislature to meet in December 2018. Both Committees acted pursuant to Joint Rule 81(2)(a), as well as Rule 93 of their houses. *See* Assembly Journal, Dec. 2018 Extraordinary Sess., at 968; Senate Journal, Dec. 2018 Extraordinary Sess., at 964. But, as the Legislature has conceded, the Legislature's rules do not have the force of law. (B-App407 at 60:17-21)

The Legislature convened the December 2018 Extraordinary Session on December 3 and adjourned it less than 48 hours later.[3] (B-App036-037, 040) The session yielded four results:

- 2017 Wisconsin Act 368, adopted by the Legislature as SB 883, signed by the Governor on December 13, and published the following day. (B-App037-038, 040)
- 2017 Wisconsin Act 369, adopted by the Legislature as SB 884, signed by the Governor on December 13, and published the following day. (B-App038-040)

[3] The Complaint contains a more granular account. (B-App036-040)

- 2017 Wisconsin Act 370, adopted by the Legislature as SB 886, signed by the Governor on December 13, and published the following day. (B-App038, 040)

- Confirmation, *en masse*, of 82 nominees to State authorities, boards, councils, and commissions by a vote held December 4. (B-App038-040); Senate Journal, Dec. 2018 Extraordinary Sess., at 980-83.

C. Procedural History

The League of Women Voters and other Plaintiffs (collectively "LWV") maintain that the December 2018 Extraordinary Session was *ultra vires* and thus its results are unenforceable. LWV initiated this declaratory judgment suit on January 10, 2019. (R.1) The Defendants were Governor Tony Evers and several Wisconsin Elections Commission officials. LWV filed an amended complaint and a temporary injunction motion on January 15, 2019. (R.4, 6) On February 22, 2019, the Wisconsin Legislature noticed motions to intervene and to dismiss the complaint. (R.57, 60) The circuit court granted the Legislature permissive intervention. (R.75)

The parties briefed both the Legislature's motion to dismiss and LWV's request for a temporary injunction. (B-

App104-311; *see also* B-App312-347; R.45-53, 63, 84)[4] After an extensive hearing (B-App348-458), the circuit court issued its Decision and Order. (B-App001-016) The circuit court denied the Legislature's motion to dismiss, because "not only does the Amended Complaint state a valid claim for relief, but a successful one." (B-App004) The court entered a temporary injunction, because "the Legislature's failure to comply with constitutional procedural requirements for legislative action invalidates the action" and "[t]he rule of law—the very bedrock of the Wisconsin Constitution—cannot, in any respect, abide enforcement of laws that do not exist." (B-App011, 013)[5]

[4] The Election Commission Defendants also filed a motion to dismiss (R.55), which was resolved by stipulation. (B-App101-102)

[5] According to the Legislature, the circuit court "concluded that Section 13.02 requires that the Legislature meet only in what the Legislature titles a 'regular session.'" (Br. at 14) That is inaccurate. The circuit court concluded that Article IV, Section 11 is "part of an overall constitutional package specifically designed to constrain legislative overreach and safeguard the people's liberty from irregular, capricious, precipitous, and unpredictable meetings of the Legislature" and that, "contrary to its unequivocal constitutional mandate, the Legislature interprets [Wis. Stat. § 13.02(3)] as permitting the Legislature to meet other than 'at such time as […] provided by law.'" (B-App006-008)

On March 27, the court of appeals stayed the circuit court's injunction pending appeal on the merits. (B-App024) This Court granted LWV's petition for bypass on April 15.

STANDARD OF REVIEW

As the circuit court recognized (B-App011), legislative failure to comply with constitutional requirements is fatal to the resulting action. *See Wis. Prof'l Police Ass'n v. Lightbourn*, 2001 WI 59, ¶66, 243 Wis. 2d 512, 627 N.W.2d 807. This Court's authority extends "far enough to determine whether an act published as a law was actually passed by the respective houses in accordance with constitutional requirements." *State ex rel. LaFollette v. Stitt*, 114 Wis. 2d 358, 366, 338 N.W.2d 684 (1983) (quoting *McDonald v. State*, 80 Wis. 407, 412, 50 N.W. 185 (1891)).

Where, as here, the Legislature is alleged to have violated a constitutionally mandated procedure, "the court will not indulge in a presumption of constitutionality, for to do so would make a mockery of the procedural constitutional requirement." *Davis v. Grover*, 166 Wis. 2d 501, 521, 480

N.W.2d 460 (1992) (quoting *City of Brookfield v. Milw. Metro. Sewerage Dist.*, 144 Wis. 2d 896, 912 n.5, 426 N.W.2d 591 (1988)).

A. This Court Applies The Constitution's Plain Text.

Constitutional interpretation is a question of law. *See, e.g.*, *Appling v. Walker*, 2014 WI 96, ¶17, 358 Wis. 2d 132, 853 N.W.2d 888 (citing *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶16, 295 Wis. 2d 1, 719 N.W.2d 408). "The authoritative, and usually final, indicator of the meaning of a [constitutional] provision is the text—the actual words used." *Coulee Catholic Schs. v. LIRC*, 2009 WI 88, ¶57, 320 Wis. 2d 275, 768 N.W.2d 868.

"Constitutions should be construed so as to promote the objects for which they were framed and adopted. 'The constitution means what its framers and the people approving of it have intended it to mean, and that intent is to be determined in the light of the circumstances in which they were placed at the time.'" *Dairyland*, 2006 WI 107, ¶19 (quoting *State ex rel. Bare v. Schinz*, 194 Wis. 397, 404, 216 N.W. 509

(1927)). To ascertain intent, courts consider "the constitutional debates and the practices in existence at the time of the writing of the constitution[] and the earliest interpretation of the provision by the legislature as manifested in the first law passed following adoption." *Wagner v. Milw. Cty. Election Comm'n*, 2003 WI 103, ¶18, 263 Wis. 2d 709, 666 N.W.2d 816.

B. This Court Interprets Statutes By Focusing On Text.

Like constitutional construction, statutory interpretation focuses on the text. This Court's "responsibility is to ascertain and apply the plain meaning of the statutes as adopted by the legislature." *Kieninger v. Crown Equip. Corp.*, 2019 WI 27, ¶14, 386 Wis. 2d 1, 924 N.W.2d 172.

"'Words that are not defined in a statute are to be given their ordinary meanings.'" *Cty. of Dane v. LIRC*, 2009 WI 9, ¶23, 315 Wis. 2d 293, 759 N.W.2d 571 (quoting *Spiegelberg v. State*, 2006 WI 75, ¶19, 291 Wis. 2d 601, 717 N.W.2d 641). "When the legislature uses different terms in a statute—particularly in the same section—[courts] presume it intended

the terms to have distinct meanings." *Milw. Dist. Council 48 v. Milw. Cty.*, 2019 WI 24, ¶29, 385 Wis. 2d. 748, 924 N.W.2d 153 (quoting *Johnson v. City of Edgerton*, 207 Wis. 2d 343, 351, 558 N.W.2d 653 (Ct. App. 1996)); *accord Armes v. Kenosha Cty.*, 81 Wis. 2d 309, 318, 260 N.W.2d 515 (1977).

"Context and structure are also important to meaning. 'Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.'" *Milw. Dist. Council 48*, 2019 WI 24, ¶11 (quoting *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110). Additionally, "statutory history" can "aid in [the Court's] plain meaning analysis," *Sorenson v. Batchelder*, 2016 WI 34, ¶29, 368 Wis. 2d 140, 885 N.W.2d 362, and "legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation," *Winebow, Inc. v. Capitol-Husting Co.*, 2018 WI 60, ¶32 n.9,

381 Wis. 2d 732, 914 N.W.2d 631 (quoting *Kalal*, 2004 WI 58, ¶51).

In interpreting a statute, this Court does not "consider the practical, political, or policy implications of the law, nor … the extrinsic ramifications of [its] construction." *Milw. Dist. Council 48*, 2019 WI 24, ¶18.

C. This Court Looks For Reasons To Affirm Discretionary Acts.

Issuing a temporary injunction is a discretionary act. *Joint Sch. Dist. No. 1, Wis. Rapids v. Wis. Rapids Educ. Ass'n*, 70 Wis. 2d 292, 308, 234 N.W.2d 289 (1975). Appellate review is limited to ensuring the circuit court did not erroneously exercise its discretion. *Id.*

This Court "look[s] for reasons to sustain a circuit court's discretionary determination." *Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶30, 326 Wis. 2d 640, 785 N.W.2d 493 (citing *Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610). If the circuit court "examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a

reasonable judge could reach," this Court will affirm. *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶13, 312 Wis. 2d 1, 754 N.W.2d 439.

ARGUMENT

The Legislature convened the December 2018 Extraordinary Session unlawfully. The Constitution allows the Legislature to "meet" only at a "time … provided by law." Wis. Const. art. IV, § 11. The December 2018 Extraordinary Session was not a regular session meeting "provided" by Wis. Stat. § 13.02, and no other "law" authorized the session. In laboring to evade this inevitable conclusion, the Legislature ignores constitutional text, distorts statutory language, and relies on purported authorities that have no legal force.

I. THE LEGISLATURE VIOLATED ARTICLE IV, SECTION 11 OF THE CONSTITUTION IN CONVENING THE EXTRAORDINARY SESSION.

A. Article IV, Section 11 Authorizes the Legislature to "Meet" Only at a "Time … Provided by Law."

The Constitution unambiguously requires express statutory authorization for the Legislature to meet.

1. The plain text of Article IV, Section 11 limits the Legislature's power to convene.

The Constitution's text is clear. The relevant portion of Article IV, Section 11 authorizes the Legislature to "meet at the seat of government at such time as shall be provided by law." Wis. Const. art. IV, § 11. There is no ambiguity.

All parties agree that "provided by law" invokes statutes—that is, laws enacted and approved with all of the mandated solemnities. *See* Wis. Const. art. IV, § 17(2); art. V, § 10. Neither the Legislature's work schedule nor its rules, both adopted by resolution, meet that constitutional standard. (B-App123-124) The Legislature conceded this point below. (B-App407 at 60:17-21)

It is worth dwelling briefly on the meaning of "meet." Quoting a recent dictionary, the Legislature defines it as "to come face to face; or into the company of." (Br. at 19) Because the "constitution means what its framers and the people approving of it have intended it to mean," *Dairyland*, 2006 WI 107, ¶19 (quoting *Bare*, 194 Wis. at 404), the best source is a dictionary familiar to those framers. As demonstrated by the

example it includes, the most fitting such definition is: "To assemble; to congregate. The council met at 10 o'clock. The legislature will *meet* on the first Wednesday in the month." 2 *American Dictionary of the English Language*, at 17 (Noah Webster ed., 1828).

The Legislature departs from this definition (and from its proffered definition, as well) by leaping to the atextual conclusion that "once the Legislature 'meets' … that constitutional meeting does not end until final adjournment." (Br. at 19) On the Legislature's telling, Article IV, Section 11 is satisfied when the Legislature first *assembles* or *congregates*, and the Legislature continues meeting even when its members are no longer *face-to-face* because they have dispersed, returned to their districts, or are handling other business.

The Legislature's forced, unnatural interpretation defies the plain meaning. Because the constitutional text is clear, "the actual words used" by the framers are "authoritative"

determinants of Section 11's "meaning." *Coulee Catholic Schs.*, 2009 WI 88, ¶57.

2. Historical sources buttress the plain-text interpretation.

Constitutional history and contemporaneous interpretation—both at the time of statehood and immediately around the most recent amendment to Article IV, Section 11—confirm the plain meaning. *Wagner*, 2003 WI 103, ¶18.

Statehood-era sources overwhelmingly evince the framers' antipathy to legislative excess and "widespread distrust of state legislative power." (B-App320 (citing Robert Luce, *Legislative Assemblies* 123 (1924)); *see also* B-App126-130, 250-252) As the Legislature acknowledged in the circuit court, "the concern was generally with too much legislating, the legislature being in [session] too often, … because it was [a] pretty skeptical time of what the legislature would do." (B-App388:1-5) The people further constrained legislative power in 1881, amending Article IV, Section 11 to halve the frequency of legislative meetings and to increase gubernatorial control over special sessions. (B-App321)

The people again amended Article IV, Section 11 in 1968. This amendment excised seven words—"once in two years, and no oftener"—from the Constitution and added none. (B-App321) In so doing, it removed the constitutional prohibition that had, since 1881, barred the Legislature from holding annual sessions. But it did not, as the Legislature claims, "provide for a full time, year-round Legislature." (Br. at 4)[6]

At "issue in [the 1968 constitutional amendment] referendum was the question of annual or biennial sessions." Alan Chartock & Max Berking, *Strengthening the Wisconsin Legislature* at II-4 (Oct. 1968). The 1968 amendment was neither proposed nor understood to create a continuous

[6] The Legislature misrepresents its source. The cited article describes the amendment as "knocking out the constitutional ban against annual sessions of the Legislature." Robert Meloon, *State Voters OK Annual Sessions of Legislature*, Capital Times, Apr. 3, 1968, at 4 (L-App33). The amendment did not provide for continuous year-round meetings. The article simply speculated that there would be "demand for an annual state budget," in which case "[t]he first six months of every year will *probably* be taken up with fiscal matters, meaning that the Legislature will work year-round with only a summer recess." *Id.* (emphasis added). This was an errant prediction of future conduct, not a description of the amendment's *legal effect*.

legislative session in contravention of the clear constitutional text and 120 years of settled practice. The intention and effect were the opposite, moving from one biennial session to two annual sessions per biennium.

The 1968 amendment followed significant investigation and study of the legislative process, especially the length of legislative sessions. In 1964, the Legislature's Committee on Legislative Organization and Procedure, working with national legislative consultant Paul Mason, observed that "[t]he one thing which needs perhaps the most urgent consideration and the one instance where the state of Wisconsin does not compare favorably with other states is the length of the legislative sessions." Paul Mason, *Wisconsin Study Report of the Committee on Legislative Organization & Procedure* 6-1 (Jan. 1964). The Committee recommended several steps "to reduce the sessions to a reasonable length." *Id.* at 30-4.

In 1968, the Legislature received *Strengthening the Wisconsin Legislature*, the result of a multi-year investigation by the Eagleton Institute of Politics at Rutgers University,

conducted in conjunction with the legislative leadership and several legislative committees. The Eagleton Study "recognize[d] the need for a better allocation of the legislature's time and for a better organization of the legislative session." Chartock & Berking, *supra*, at II:11-12.

The Eagleton Study's proposed solution was the very opposite of continuous sessions: "the interim between [annual sessions] should be maximized" for more extensive and effective committee work. *Id.* at II:8; *accord* Subcomm. on Legis. Sess. & Comp. of the Jt. Comm. on Legis. Org., Rep. on Legis. Reorg., § III, ¶¶4, 12 (Sept. 19, 1968). The constitutional amendment passed only months earlier did not resolve this on its own, but it could facilitate a statutory solution. As explained by the Legislative Reference Bureau ("LRB"), one of the Legislature's service agencies, the 1968 amendment "allows the Legislature … to determine the length, frequency and internal organization of future sessions *by law*." Selma Parker, *The Time Structure of Legislatures Today*, LRB-IB-68-3 (1968) at 3 (emphasis added).

Even before the 1968 amendment, the Legislature was spacing out its meetings by breaking its regular session into multiple workperiods. *Id.* at 2 ("Since 1959 every Wisconsin Legislature has held at least 4 session periods."). The 1968 amendment brought the Constitution into alignment with that practice. It left the ball in the Legislature's court to adopt statutory authorization for the structure it wanted to use.

B. The December 2018 Extraordinary Session Was Not Convened at a "Time … Provided by Law."

To effectuate Article IV, Section 11's command that the Legislature "meet" only at a "time … provided by law," the first Wisconsin Legislature adopted a statute governing meeting times. Wis. Stat. ch. 8, § 1 (1849). The current version of that statute authorizes "Regular sessions," which occur on an annual basis. Wis. Stat. § 13.02. The absence from section 13.02 of any authorization for an extraordinary session is itself dispositive of the Legislature's claim that the December 2018 Extraordinary Session complies with Article IV, Section 11's

command to "meet" at a "time … provided by law." Wis. Const. art. IV, § 11.

1. By its plain text, Wis. Stat. § 13.02 text did not "provide by law" for the December 2018 Extraordinary Session.

Nowhere does Wis. Stat. § 13.02 mention, much less authorize the Legislature to convene, an extraordinary session. Importantly, the Legislature knows how to authorize extraordinary sessions. Current law provides for an extraordinary session to approve an agreement for long-term disposal of radioactive waste. Wis. Stat. § 196.497(10)(c). And in the late-1980s, Wis. Stat. § 13.02(3m) briefly authorized an extraordinary budget session between the two regular annual sessions of the biennial session period. 1987 Wisconsin Act 4, § 1 (creating sub. (3m)), §§ 1m, 24(2) (repealing sub. (3m), effective in 1989).

Under section 13.02, the regular session "commence[s]" with a meeting each January. Wis. Stat.

§ 13.02(2).[7] Once commenced, the regular session is extended by temporary adjournments to a date-certain. Using such extensions, the regular session proceeds as a chain, with one meeting linked to the next. The Legislature forges that chain each time it recesses or temporarily adjourns. Either the adjournment identified a date-certain on which the Legislature will reconvene, *see, e.g.*, Assembly Journal, 103rd Reg. Sess. at 88; Senate Journal, 103rd Reg. Sess. at 10, or it references the next floorperiod included in the Legislature's work schedule.[8] Either way, the adjournment adds the chain's next link, extending the regular session.

That chain is broken and the regular session ends when the Legislature adjourns without forging a new link. *See, e.g.*, Assembly Journal, 103rd Reg. Sess., at 908; Senate Journal, 103rd Reg. Sess., at 871. At that point, the only way the Legislature can convene before the beginning of the next

[7] This is the source of legal authority for "the regular session" to "commence," even if a work schedule modifies the date/time.

[8] Adjournment "pursuant to" the joint resolution containing the work schedule indicates that the regular session will resume during the next scheduled floorperiod. *See, e.g.*, Assembly Journal, 103rd Reg. Sess. at 11.

regular annual session is if the Governor calls a special session.[9]

The Legislature broke the chain in 2018 when it adjourned its last scheduled floorperiod without establishing a date-certain for reconvening or adding another scheduled floor period to its work schedule. Assembly Journal, 103rd Reg. Sess. at 909; Senate Journal, 103rd Reg. Sess. at 905. By adjourning indefinitely—which, as Governor Evers noted below (B-App175-177), is literally an adjournment *sine die* (without day)—the Legislature ended the regular session "provided by" section 13.02.[10]

---

[9] As the *amici* legal scholars explained below, to hold otherwise and allow the Legislature to convene itself at whim would "usurp [a] gubernatorial prerogative" and undermine Wisconsin's "deliberate constitutional choice to vest the governor—and *not* legislative actors—with the power to convene the Legislature outside the ordinary course." (B-App319)

[10] Legislators and observers alike understood the regular session ended on March 22. *See, e.g.*, Rep. Hesselbein, *Capitol Update* (Apr. 13, 2018), available at http://tiny.cc/5l5y5y ("The Wisconsin State Assembly wrapped up its floor period for the 2017-18 session on March 22."); Hamilton Consulting Group, LLC, *Hamilton Political Tidbits–2018 Session Wrap Up* (Mar. 23, 2018), available at http://tiny.cc/ji5y5y ("[T[he legislature will not reconvene until January 2019."); Joe Forward, *Legislative Wrap-Up*, 10 Inside Track No. 6 (State Bar of Wis.), Apr. 4, 2018, available at http://tiny.cc/tg5y5y ("The Wisconsin Legislature passed a barrage of bills last month to close the 2017-18 session.").

Removing any doubt, the Legislature also "adversely disposed of" all "bills and [] resolutions" left pending "at the end of the last general-business floorperiod, which was adjourned on March 22, 2018." Assembly Journal, 103rd Reg. Sess., at 917; Senate Journal, 103rd Reg. Sess., at 881. This action, which foreclosed the adoption of further general-business legislation, constitutes a "form of adjournment which would terminate the session." *State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 290, 125 N.W.2d 636 (1964).

When the Legislature convened the December 2018 Extraordinary Session on December 3, more than eight months had passed since the Legislature adjourned its last scheduled general-business floorperiod and adversely disposed of all pending proposals. Once the Legislature broke the regular-session chain, it could no longer meet at a "time … provided by law" until January 2019.

2. Statutory and legislative history confirm Wis. Stat. § 13.02's plain meaning.

This Court uses "statutory history" to "aid in [] plain meaning analysis," *Sorenson*, 2016 WI 34, ¶29, and

"legislative history … to confirm or verify a plain-meaning interpretation," *Winebow, Inc.*, 2018 WI 60, ¶32 n.9 (quoting *Kalal*, 2004 WI 58, ¶51). Here, both underscore that the text of Wis. Stat. § 13.02 contains no authority for the Dec. 2018 Extraordinary Session.

Section 13.02 was revised in 1971 to "implement[] the 1968 amendment to Article IV, Section 11." (Br. at 6) The revision added a simple introductory statement to the statute: "The legislature shall meet annually." Wis. Stat. § 13.02. Though the 1971 revision is central to the Legislature's argument, that same enactment puts a stake through the Legislature's case.

There is no way to reconcile the argument that "the Legislature understood the 1968 [constitutional] Amendment to permit … a single, continuous biennial session" (Br. at 21) with this express statutory mandate that the Legislature shall meet in separate *annual* sessions. The only way to square this circle is to read words out of the statute, which is contrary to the canons of statutory construction. *See, e.g.*, *State v. Matasek*,

2014 WI 27, ¶¶17-18, 353 Wis. 2d 601, 846 N.W.2d 811. The appearance of "annual" in section 13.02 defenestrates the Legislature's theory.

The Legislature's insistence on ignoring the word "annual" is also inconsistent with LRB's contemporaneous understanding of the statutory revision:

> *Beginning with the 1971 legislature, however, annual sessions were formally inaugurated by law*, which specified that the regular sessions are to begin in January of each year. Thus, in response to the constitutional amendment adopted in 1968, *the 1971 legislature became the first to [adopt] an annual sessions pattern*.

Wisconsin Legislative Reference Bureau, *The Organization of Wisconsin State Government*, 4-5 (1974) (emphases added). LRB's contemporaneous summary of the 1971 revision bolsters LWV's plain-text reading and further buries the Legislature's contrary interpretation.

Legislative history similarly confirms the plain text. The 1971 revisions to Wis. Stat. § 13.02 were preceded by extensive study and consideration. In the wake of 1964 Mason Report and the 1968 Eagleton Study, in 1970 the Joint

Committee on Legislative Operations convened a Joint Study Committee on Scheduling Legislative Sessions.

The Joint Study Committee considered a variety of possible modifications. Two are particularly relevant.

First, the Joint Committee reviewed a proposal under consideration in California to make that state's legislature "a continuous body," with sessions breaking only momentarily every two years to accommodate changes in membership after statewide elections. Letter from H. Rupert Theobald to Sen. Clifford W. Krueger, Chairman, Jt. Study Comm. on Scheduling Leg. Sess. (Apr. 30, 1970) at 2, 40. The Joint Committee did not recommend that Wisconsin pursue such a change.

Second, the Joint Committee considered but rejected the idea of adding language to Wis. Stat. § 13.02 that would have authorized the Legislature to convene "extraordinary worksessions" during the interim times between scheduled floorperiods. *See* 1969 Assembly Substitute Amend. 2 to AB 1015 at 1:18-2:4. Notably, even that language would not have

authorized what occurred last December—namely, an extraordinary session months after the last scheduled floorperiod and the end of the regular session.

3. The Legislature's arguments depart from the statutory text.

The Legislature's efforts to find authority in Wis. Stat. § 13.02 for the December 2018 Extraordinary Session fail.

a. The Legislature invokes a "biennial session," contradicting the statute.

The Legislature's brief references a "biennial session" more than a dozen times. But Wisconsin has not had a biennial legislative session for nearly 50 years. Since 1971, the law has mandated that "[t]he legislature shall meet annually." Wis. Stat. § 13.02. For this reason, the Legislature's description of "a single, continuous biennial session," with "adjournment occurring only immediately before the next biennial session begins" (Br. at 4, 21) is fictitious.[11] The Legislature's derivative description of "a single, continuous biennial

[11] LRB's analysis of the revisions to Wis. Stat. § 13.02 made this clear. Like the amended statute, the analysis begins with a simple, declarative sentence: "This bill directs the legislature to meet in annual sessions." 1971 Senate Bill 60 at 1:5.

session," broken up according to a work schedule adopted by joint resolution (Br. at 32) is similarly errant.

Subsection (3) of section 13.02 reinforces that the Legislature "shall" hold "at least one meeting in January of each year." Wis. Stat. § 13.02(3). If, as the Legislature posits, there is a singular meeting coextensive with the entire biennial session period, this phrase has no meaning. Such an interpretation is to be avoided. *See, e.g.*, *Estate of Miller v. Storey*, 2017 WI 99, ¶42 & n.19, 378 Wis. 2d 358, 903 N.W.2d 759 (citing *Kalal*, 2004 WI 58, ¶46); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174-179 (2012). Nor can this phrase be dismissed as a vestige that predates the current constitutional text, because subsection (3) "is the legislation implementing the 1968 amendment to Article IV, Section 1 [*sic*]." (Br. at 32-33)

b. The Legislature improperly conflates distinct statutory terms.

Most of the Legislature's arguments focus on Wis. Stat. § 13.02(3). This reliance on subsection (3) is misplaced.

Subsection (3) instructs a legislative committee to "meet and develop a work schedule" for the regular session, "to be submitted to the legislature as a joint resolution." Wis. Stat. § 13.02(3). It goes no further. Because subsection (3) authorizes no meetings of the Legislature, it can neither satisfy Article IV, Section 11's mandate nor bear the weight the Legislature's brief places upon it as the legal basis for indefinite, *ad hoc* sessions.

By the Legislature's logic, as long as the work schedule identifies the biennial session period's boundaries, constitutional constraints do not apply to meetings of the Legislature occurring within those boundaries. (Br. at 29) But, as the circuit court noted, subsection (3) "does not say this, or anything close." (B-App009)

The Legislature asserts that the work schedule serves "to govern the Legislature's meeting," which it portrays as a single, continuous meeting necessarily coextensive with the "biennial session period." (Br. at 30) But that is not what the

statute says.[12] This effort to conflate "the legislative session" with a single, continuous meeting lacks any statutory basis.[13] (It is also inconsistent with Section 2 of 2017 SJR1, which gives notice of the date on which the subsequent Legislature "will hold its first meeting, pursuant to section 13.02(1)." (L-App128). If the entire biennial session period were one continuous meeting, the word "first" would be a misnomer.)

Rejecting the Legislature's conflation of terms unravels the claim that subsection (3) authorizes a continuous biennial session. It also vindicates the rule that "when the Legislature uses different terms"—here *biennial session period* and *the legislative session*—in the same statutory subsection, courts

[12] This is not the only liberty the Legislature takes in summarizing Wis. Stat. § 13.02. Subsection (3) does not "require[] the Legislature to enact a 'work schedule.'" (Br. at 30) The statute instructs the committee to propose a schedule, but does not require the Legislature to adopt it. Wis. Stat. § 13.02(3). The Legislature also imports the term "biennial session" into subsection (1), though those words do not appear together in section 13.02 (except as part of "biennial session period" in subsection (3)).

[13] The conflation also runs afoul of how the terms "meeting" and "session" are used. Historically, the Legislature convened for one meeting coextensive with the session, but, following changes in transportation and commerce, the Legislature wanted to break its work into multiple meetings, each of which is part of the legislative session. (B-App320-322) That is what the 1968 amendment provides. *See* Section I.A.2, *supra*.

"presume it intended the terms to have distinct meanings." *Milw. Dist. Council 48*, 2019 WI 24, ¶29 (quoting *Johnson*, 207 Wis. 2d at 351). And it saves the references to regular annual sessions in both subsections (2) and (4) from being rendered nonsensical. *Id.*, ¶11 (quoting *Kalal*, 2004 WI 58, ¶46).

c. The Legislature invents terminology from whole cloth.

The Legislature also invents new terminology wholesale, without statutory foundation. It does so in service of its attempt to define "extraordinary session" as "a non-prescheduled floor period." (Br. at 4, 6, 7, 8, 16, 22, 28, 29, 32, 33, 35, 36) This "is a *post hoc* fiction" invented "to justify the authority the Legislature wrongfully assumed to convene and meet" last December. (B-App009) Neither the Constitution nor Wis. Stat. § 13.02 mentions floorperiods, much less whether one was prescheduled. (The idea of a "'non-prescheduled floor

period' is the antithesis of a 'work schedule,' by both definition and force of logic." (B-App009)[14])

The Legislature defines floorperiods not in the statute, but in its work schedules. As the Legislature has conceded, work schedules, because they are adopted by joint resolutions, are not "law" but merely convenient tools for internal calendaring. (B-App407 at 60:17-21) Such conveniences cannot provide authority for the Legislature to meet.

Even if a work schedule could somehow authorize non-prescheduled meetings, it would not apply to extraordinary sessions, because the work schedule is created under the auspices of section 13.02, which authorizes only regular sessions. The limited scope of section 13.02 is apparent from the statutory text, which never mentions extraordinary sessions. It is underscored by the title: "Regular sessions." Wis. Stat. § 13.02.[15] The absence of any reference to extraordinary

[14] The concept, "by its very nature, is not a meeting 'at such time as [… provided] by law.'" (B-App009)

[15] "The title of a statute cannot defeat the language of the law, but it is persuasive evidence of a statutory interpretation." *Mireles v. LIRC*, 2000 WI 96, ¶60 n.13, 237 Wis. 2d 69, 613 N.W.2d 875 (citing *Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 253, 219 N.W.2d 564

sessions in section 13.02, reinforced by the limited scope expressed by the statutory title and the text of the surrounding subsections, rebuts the Legislature's argument that Wis. Stat. § 13.02(3) authorized the December 2018 Extraordinary Session.

To reach the opposite conclusion—that subsection (3) *sub silentio* authorizes delegating to a handful of legislators the authority to convene the Legislature in extraordinary session at whim—"would swallow much of Article IV, Section 11 whole" and "demote[] the controlling language in Article IV, Section 11 to the status of mere surplusage." (B-App008, 010) Such a reading cannot be credited. *See, e.g.*, *Appling*, 2014 WI 96, ¶23; *NLRB v. Noel Canning*, 573 U.S. 513, 584 (2014) (Scalia, J., concurring in judgment). The Legislature's approach would render the restrictions of Article IV, Section 11 a dead letter. *See, e.g.*, *Foster v. City of Kenosha*, 12 Wis. 616, 620 (1860) (affirming injunction against enforcement of

(1974)); *accord* Scalia & Garner, *supra*, at 221 ("Titles and headings are permissible indicators of meaning.").

amendment to city charter that rendered a "provision of the constitution … a dead letter, entirely inoperative and of no effect").

d. Neither the Constitution nor Wis. Stat. § 13.02 requires *sine die* adjournment.

Recognizing that the statutory text does not support its actions, the Legislature adopts a fallback option. It insists—in the same paragraph where it purports to apply the ordinary definition—that "meet" is actually a legislative term of art: "the Legislature meets in *the constitutional sense* until it adjourns *sine die*." (Br. at 20 (first emphasis added)) Yet the Legislature makes no effort to illuminate how "the constitutional sense" of the word "meet" differs from ordinary usage. That is because the Legislature is not redefining "meet," but instead reading new words that do not appear in Article IV, Section 11—and "that the people of Wisconsin did not approve"—into the Constitution. (B-App009)

The Legislature asserts that, once it begins to "meet" under Article IV, Section 11, its "constitutional meeting does not end until" it adjourns *sine die*. (Br. at 20) The Constitution

says no such thing. Nor do the cases the Legislature cites. Those cases—*State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 290, 125 N.W.2d 636 (1964), and *State ex rel. Sullivan v. Dammann*, 221 Wis. 551, 555, 267 N.W. 433 (1936)—recognize the uncontroversial principle that the Legislature can, utilizing proper procedure, recess and reconvene. That is, they are consistent with the description above of the regular session as a chain. And that means they buttress LWV's argument that the December 2018 Extraordinary Session was unlawful, because the regular session ended months earlier when the Legislature broke the chain. *See* Section I.B.1, *supra*.

4. The Legislature's interpretation of Wis. Stat. § 13.02 is irreconcilable with past practice.

The Legislature encourages this Court to adopt the fallacy that extraordinary sessions are part and parcel of, not different in kind from, the regular session. But the Legislature's position conflicts with its own practice, even within the relatively short period since the Legislature claims to have begun "setting a continuous constitutional meeting of

the Legislature for the entire two-year period while allowing itself to change a prescheduled committee period into … an extraordinary session." (Br. at 7) This inconsistency exposes the Legislature's argument as "a *post hoc* fiction." (B-App009)

a. The December 2018 Extraordinary Session was not part of the regular session because extraordinary sessions differ in kind.

Extraordinary sessions differ in kind from, and therefore cannot be defined as components of, regular sessions. The truth of this is in their name, which includes the adjective "extraordinary," defined as "going beyond what is … regular[.]"[16] This is not mere semantics. The Legislature and its committees treat extraordinary sessions differently, because such sessions use different procedural rules and have specific, limited scope. *See* Assembly Rule 93; Senate Rule 93. The legislative journals record extraordinary sessions differently from the regular session. Their titles—printed in large letters at the top of each page—make this clear. *Compare* Assembly

[16] Merriam-Webster, *Extraordinary*, https://www.merriam-webster.com/dictionary/extraordinary.

Journal, 103rd Reg. Sess. at 833 *with* Assembly Journal, Dec. 2018 Extraordinary Sess. at 893; *compare also* Senate Journal, 103rd Reg. Sess. at 842 *with* Senate Journal, Dec. 2018 Extraordinary Session at 978.[17]

LRB analyses also distinguish extraordinary sessions. LRB defines an extraordinary session as one "initiated by the legislature" "to consider one or more specified topics or pieces of legislation" and notes that it "differ[s] from regular sessions in [] purposes and procedures." Daniel F. Ritsche, *Special and Extraordinary Sessions of the Wisconsin Legislature*, LRB-IB-14-2 at 1 (2014).

LRB compares extraordinary sessions to special sessions, distinguishing both from regular sessions. *See id.* The comparison is illuminating because, under precedential legislative rulings, "a special session is a 'new session' in the

[17] This Court has held that the contents of the house's journals "are controlling as regards what the legislature does." *Milw. Cty. v. Isenring*, 109 Wis. 9, 26, 85 N.W. 131 (1901). *Accord, e.g.*, *State ex rel. Gen. Motors Corp., AC Elecs. Div. v. City of Oak Creek*, 49 Wis. 2d 299, 317, 182 N.W.2d 481 (1971) ("[I]t has been clearly established that the journals of the legislature are proper subjects of judicial notice … for the purpose of determining whether or not a statute has been validly enacted.").

sense that it is entirely separate in all its particulars from the regular session of the same legislature." *Id.* at 4 (quoting Assembly Journal, 1963 Special Sess. at 16). The "chief difference is that a special session is called by the governor and an extraordinary session is initiated by the legislature." *Id.* at 1. The Legislature's litigation efforts to disguise the December 2018 Extraordinary Session "as part of" the regular session (Br. at 26, 34-35) cannot overcome these differences. (*See* B-App130-132)

b. The Legislature has never considered extraordinary sessions to be part of the regular session—until this case.

Within the relatively short time since the Legislature held its first extraordinary session, it has consistently demonstrated that it recognizes the difference in kind between regular and extraordinary sessions.

Consider, for example, 1987 Wisconsin Act 4, which temporarily created Wis. Stat. § 13.02(3m) to authorize an extraordinary session between the biennial session period's two regular annual sessions. The very fact that the Legislature

enacted a law to authorize an extraordinary session undermines its current insistence that the 1968 amendment to Article IV, Section 11 granted it *carte blanche* "to turn one of its committee periods into … an extraordinary session" at will. (Br. at 6) Had the 1968 amendment conferred such authority, this facet of Act 4 would have been superfluous.

Moreover, Act 4 proves that the Legislature recognized a gap—during which it was not in session—between the two regular annual sessions provided by Wis. Stat. § 13.02(2). This recognition coexists with the 1987 work schedule (L-App052-053), even though it, like 2017 SJR 1, "provided that the Legislature would continue to meet … on each day of th[e] continuous biennial session." (Br. at 23) The work schedule included a "committee work period" that filled that gap. (L-App052-053) Yet, the Legislature provided in Act 4 for an extraordinary session during that committee work period. This is doubly revealing. *First*, it makes clear that the Legislature recognized the need for a statutory basis (beyond Wis. Stat. § 13.02(3)) to convert committee days into extraordinary

sessions. *Second*, it contradicts the Legislature's argument that committee work requires—and therefore evidences—continuous legislative sessions (Br. at 23).

A more recent example highlighting this contradiction occurred during the 2018 regular annual session. On March 22, 2018, both houses met and adjourned in regular session and also met and adjourned in extraordinary session. Assembly Journal, 103rd Reg. Sess. at 908; Assembly Journal, Mar. 2018 Extraordinary Sess. at 893; Senate Journal, 103rd Reg. Sess. at 871; Senate Journal, Mar. 2018 Extraordinary Sess. at 873. If extraordinary sessions were really nothing more than extra floorperiods within the regular session, there would be no reason that business begun in an extraordinary session could not carry over into a regular-session floorperiod, and vice-versa. The care the Legislature takes to keep them separate repudiates its insistence that this case "is about labels, not constitutional or even statutory substance." (Br. at 17)

5. The Legislature's interpretation of Wis. Stat. § 13.02 leads to absurd consequences.

The implications of the Legislature's argument reveal its wrongheadedness. One implication is inadvertently appears in the contradictory assertion that, following the Legislature's last scheduled floorperiod in 2018, "the houses adjourned … while the Legislature itself continued to meet." (Br. at 25) The Constitution defines the Legislature as comprising the two houses. Wis. Const. art. IV, § 1. Apart from them, there is no Legislature to continue meeting.[18] Other problems, less apparent on the face of the Legislature's brief, also undermine the Legislature's position.

The Legislature argues (Br. at 29, 31-32) that, because its work schedule references the hypothetical possibility of an

[18] The Legislature appears to argue that committee meetings held during a recess or adjournment of the Legislature constitute legislative meetings under Article IV, Section 11. That argument is baseless. "The great weight of judicial authority sustains the power of the Legislature to invest its committees with power to function, though the session is over." *People ex rel. Hastings v. Hofstadter,* 180 N.E. 106, 108 (N.Y. 1932) (Cardozo, J.); *accord, e.g.*, *State ex rel. James v. Aronson*, 314 P.2d 849, 858-59 (Mont. 1957); *State ex rel. Robinson v. Fluent*, 191 P.2d 241, 245 (Wash. 1948); Norman J. Singer & J.D. Shambie Singer, 1 *Sutherland Statutory Construction* § 12:17 (7th ed.).

extraordinary session, that obviates the express constitutional requirement that the Legislature "meet" at a "time … provided by law." Wis. Const. art. IV, § 11. But, if the Legislature can use its nonbinding work schedule to circumvent Article IV, Section 11, nothing prevents it from using that same vehicle to evade other constitutional constraints on its power, including bicameralism and presentment. The implications of the Legislature's position would take a meat axe to fundamental principles of constitutional governance. For this reason, the circuit court flagged that, "[t]hrough coiled reasoning, the Legislature essentially adds language and meaning into the Constitution that the people of Wisconsin did not approve." (B-App009)

Additionally, accepting the Legislature's atextual and counterfactual assertion of a continuous session leads to several absurd practical and statutory consequences. *First*, it would insulate legislators against arrest and "any civil process" from the moment they join the Legislature until their retirement, regardless of how many years they may serve. Wis.

Const. art. IV, § 15. It would similarly immunize legislators from any court proceedings as long as they hold office. *See* Wis. Stat. § 757.13.

Second, the Legislature's insistence that over the past "more than four decades," it has "filled every single day" of each biennium "with legislative business" (Br. at 4) is inconsistent with the statute on reimbursement of legislators' expenses. That statute presumes reimbursements will "not includ[e] any Saturday or Sunday." Wis. Stat. § 13.123(1)(a)1.

Third, a continuous session would render meaningless a provision restricting lobbyists from making financial contributions to legislators until "the legislature has concluded its final floorperiod." Wis. Stat. § 13.625(1m)(b)1. If the Legislature meets in continuous session and has authority to convene non-prescheduled floorperiods at any time, no lobbyist can ever be certain that the Legislature "has concluded its *final* floorperiod." *Id.* (emphasis added). It would follow that there is no time lobbyists can make contributions without risking legal violation.

This consequence militates against the Legislature's argument. Where "the potential for conflict between [multiple] statutes is present, [courts] read the statutes to avoid such a conflict if a reasonable construction exists." *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶28, 303 Wis. 2d 258, 735 N.W.2d 93; *accord Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010); Scalia & Garner, *supra*, at 252 ("if possible, [a statute] should no more be interpreted to clash with the rest of [the *corpus juris*] than it should be interpreted to clash with other provisions of the same law").[19]

The restriction on lobbyist contributions was adopted *after* the Legislature claims to have begun holding continuous biennial sessions during which it is in session "every single day" of the biennium. (Br. at 4). That means the Legislature purports to have adopted a law limiting contributions that, from its inception, could not have any meaning or effect. Such a

[19] The Legislature argues that LWV's theory renders surplus references to extraordinary sessions in this and two other statutes. (Br. at 36-37) That is wrong. These references apply to sessions convened under Wis. Stat. § 196.497(10)(c) and will also apply to any other extraordinary session the Legislature may authorize by statute.

conclusion contravenes the Court's prohibition on absurd interpretations. *Milw. Dist. Council 48*, 2019 WI 24, ¶11 (quoting *Kalal*, 2004 WI 58, ¶46).

C. Existence of Prior Extraordinary Sessions Does Not Foreclose LWV's Argument.

In the face of clear constitutional and statutory text, the Legislature cites "four decades of previously uncontroversial legislative practice" (Br. at 2) to insist LWV must be wrong. This both exaggerates the history of extraordinary sessions and understates the importance of constitutional constraints on government power. In any event, "the historical practice of the political branches is, of course, irrelevant when the Constitution is clear." (B-App010 (quoting *Noel Canning*, 573 U.S. at 584 (Scalia, J., concurring in judgment))

Wisconsin survived more than 130 years—from statehood until 1980—without the Legislature holding an extraordinary session. In the relatively short time since the Legislature jury-rigged its first extraordinary session, the Legislature has averaged significantly less than one such session annually. (Br. at 8) Several biennial session periods

have passed, including as recently as 2013-2014, without an extraordinary session.

Even when extraordinary sessions have been used, the results are not nearly as voluminous as the Legislature's brief suggests. Of the 330 bills and 9 resolutions passed during extraordinary sessions, 172—more than half of the total—are accounted for by only two of the 28 extraordinary sessions the Legislature lists.[20] The vast majority of those extraordinary sessions—19 of them—yielded six or fewer enactments, and more than one-third (10 sessions) yielded only one or two.

The Legislature insists that it "has adopted some of the most important laws" through extraordinary sessions. (Br. at 8) Even if true (and it seems doubtful), this is irrelevant. This Court does not "consider the practical, political, or policy implications of the law, nor … the extrinsic ramifications of [a statute's] construction," as part of determining plain meaning. *Milw. Dist. Council 48*, 2019 WI 24, ¶18.

[20] There is no relevance to Governor Evers giving the 2019 budget address before an extraordinary session; the Legislature conducted no legislative business—that is, passed no laws—during that session.

Nor are unconstitutional practices saved by sheer repetition. As *amici* legal scholars noted below, "[l]egal defects, especially ones involving unglamorous matters of state constitutional structure, often escape notice until a catalyzing event occurs." (B-App327) This Court has definitively rejected the theory that using a practice for years renders it constitutional. For example, in *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21, the Court deemed judicial deference to agency interpretations of law improper. Roots tracing back nearly 150 years, *see id.*, ¶18 (citing *Harrington v. Smith*, 28 Wis. 43, 59-70 (1871)), did not protect such deference from scrutiny and ultimately rejection.

Similarly, the U.S. Supreme Court held the legislative veto unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983). Congress emphasized that it had passed (and Presidents had signed) legislative-veto provisions for more than 50 years, resulting in approximately 300 such federal statutory provisions. *See id.* at 944-45. In response, the Court observed

that the judicial "inquiry is sharpened rather than blunted" by the "frequency" with which the challenged practice was being used. *Id.* at 944. Nor was the Court deterred by arguments about utility: "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Id.* "[E]ven useful 'political inventions' are subject to the demands of the Constitution which defines powers." *Id.* at 945.

Tetra Tech and *Chadha* are only examples. It is not rare for the judiciary to consider a new constitutional argument, even one implicating long-standing provisions. Such cases sometimes result in displacement of long-held understandings and practices. As Justice Scalia explained, there is no "adverse-possession theory" of constitutional law whereby, because one political branch has "long claimed the powers in question" and the other "has not disputed those claims with sufficient vigor," the judiciary "should not upset the compromises and working arrangements that the elected branches of Government

themselves have reached." *Noel Canning*, 573 U.S. at 570 (Scalia, J., concurring in judgment) (internal quotation marks omitted).

Yet the Legislature advocates *exactly* that adverse-possession theory here, urging this Court to reject the plain meaning of Article IV, Section 11 or rewrite Wis. Stat. § 13.02 because extraordinary sessions have been (sporadically) held for less than one-fourth of Wisconsin's history as a state. The Legislature's argument cannot be accepted. *See, e.g.*, *Bd. of Trs. of Lawrence Univ. v. Outagamie Cty.*, 150 Wis. 244, 253, 136 N.W. 619 (1912) ("Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the constitution, and appointed judicial tribunals to enforce it." (internal quotation marks omitted)).

D. This Court Has Both the Power and the Responsibility To Review the Legislature's Compliance with the Constitution.

The Legislature argues that "the courts' jurisdiction is at an end" once it decides that "the Legislature complied with

Article IV, Section 11 by 'meet[ing]' from January 2017 to January 2019." (Br. at 26) This is wrong in every sense.

First, as discussed above, the factual predicate is false. The Legislature was not in continuous biennial session last December. Nor did it take action to "finally adjourn" in "January 2019." (Br. at 1) These are distortions.

Second, the Legislature also gets the law wrong. Whether the December 2018 Extraordinary Session violated constitutional requirements—including the requirement that it occur at a "time … provided by law"—*is* a proper subject for judicial review. *See Lightbourn*, 2001 WI 59, ¶93 (holding that, where legislative rule misconstrued Constitution, the rule did not control); *see also, e.g.*, *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶51, 334 Wis. 2d 70, 798 N.W.2d 436 (Prosser, J., concurring) (quoting *Stitt*, 114 Wis. 2d at 365) ("[T]he legislature's adherence to the rules or statutes prescribing procedure is a matter entirely within legislative control and discretion, not subject to judicial review *unless the legislative procedure is mandated by the constitution*." (emphasis

added)); *State ex rel. Elfers v. Olson*, 26 Wis. 2d 422, 426, 132 N.W.2d 526 (1965) ("The courts have jurisdiction to entertain an action challenging legislative action where it is clear that the legislative action involves an alleged violated of a constitutional requirement."); *McDonald*, 80 Wis. at 412 (courts "will take like notice of the contents of the journals of the two houses of the legislature far enough to determine whether an act published as a law was actually passed by the respective houses in accordance with constitutional requirements").

To hold otherwise would negate the very notion of judicial review:

> The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

Mayo v. Wis. Injured Patients & Families Comp. Fund, 2018 WI 78, ¶84, 383 Wis. 2d 1, 914 N.W.2d 678 (R.G. Bradley, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch)

137, 178 (1803)). Constitutional constraints on the other branches "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." *The Federalist No. 78* at 497 (Alexander Hamilton) (Robert Scigliano ed., 2000).

That the judiciary's "particular duty … to hold up the constitution safely above every act of lawmaking power which would otherwise violate it" may, as here, be "viewed with impatience by those called to face constitutional restraints, cannot have any weight whatever as to whether the duty should be performed." *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 491, 137 N.W. 20 (1912). "Judicial respect for its co-equal branch, the legislature, cannot amount to surrender of judicial power or abdication of judicial duty." *Mayo*, 2018 WI 78, ¶84 (R.G. Bradley, J., concurring). That is why this Court, while "conscious of the substantial deference [judges] owe to the

other independent branches of government in the exercise of their constitutional responsibilities," is "also conscious of [its] own responsibility to determine whether the provisions of the Wisconsin Constitution have been followed." *Milw. Journal Sentinel v. Wis. Dep't of Admin.*, 2009 WI 79, ¶33, 319 Wis. 2d 439, 768 N.W.2d 700. Abdicating this responsibility "scrambles the constitutional roles of the judiciary and the legislature, making legislators the judges of their own laws."[21] *Mayo*, 2018 WI 78, ¶84 (R.G. Bradley, J., concurring)

The Constitution does not authorize extraordinary sessions. No source of "law" within the meaning of Article IV, Section 11 authorized the December 2018 Extraordinary Session. The Rules of Proceedings Clause, Wis. Const. art. IV,

[21] A recent commentary illustrates the danger of such scrambling. In it, former Democratic Assembly Speaker Tom Loftus defends extraordinary sessions as "a move to bring some parity with the governor." Tom Loftus, *Wisconsin Legislature alone controls 'extraordinary' sessions*, Capital Times, Apr. 26, 2019, available at http://tiny.cc/ezpv5y. It is difficult to reconcile Speaker Loftus's defense of extraordinary sessions with his earlier admonitions that "denizens of the legislature, the mere mortals elected to visit the joint for brief periods, must be handcuffed by the Constitution," because "the limits on power, if they are tested and seem elastic, will be stretched and stretched some more." Tom Loftus, *The Art of Legislative Politics* 62-63 (1994). To protect those limits, "in a system of divided government," he has observed, "it is often only the court that can keep equilibrium." *Id.* at 62.

§ 8, does not immunize the Legislature's *ultra vires* actions because the Legislature "may not by its rules ignore constitutional restraints." *United States v. Ballin*, 144 U.S. 1, 5 (1892).

The issue here is one of fidelity to the Constitution, which is squarely within this Court's jurisdiction. *Ozanne* declined to adjudicate complaints that the Legislature failed to comply with a statutory mandate, 2011 WI 43, ¶13 (per curiam), *but only after* determining that the legislative actions at issue did not violate the Wisconsin Constitution, *id.*, ¶11. *Ozanne* (bolstered by more than a century of consistent precedent) is, therefore, fatal to the Legislature's insistence that the judiciary has no role here. This Court's role is to protect the Constitution—by engaging in judicial review.

II. NO QUORUM OF THE LEGISLATURE CALLED THE DECEMBER 2018 EXTRAORDINARY SESSION.

In convening the December 2018 Extraordinary Session, the Legislature also violated the Constitution's mandate that a quorum of each house is necessary to conduct

legislative business. Wis. Const. art. IV, § 7. Because neither Organizing Committee comprises "a majority" of its respective chamber, convening the December 2018 Extraordinary Session at the Organizing Committees' direction violated the requirement that only "a majority of each [house]" constitutes the necessary "quorum to do business." *Id.* The circuit court recognized the problem with allowing the December 2018 Extraordinary Session to "be convened by a handful of legislators on two legislative committees." (B-App007-008)

The Legislature provides no specific answer to the quorum objection. It insists that, because under its theory there was an ongoing continuous biennial session, the decision to convene the December 2018 Extraordinary Session was not one "to do business" in the constitutional sense. (Br. at 28-29) This is incorrect for two reasons. *First*, the continuous biennial session does not exist; the regular annual session had already ended, and the December 2018 Extraordinary Session was distinct from it. *Second*, even working within the Legislature's framework, the decision to convene the full Legislature for the

purpose of making law triggers the Article IV, Section 7 quorum requirement. Indeed, making law is the essence of legislative business. *See, e.g.*, *State ex rel. Milw. Med. Coll. v. Chittenden*, 127 Wis. 468, 502, 107 N.W. 500 (1906) ("The constitutional authority vested in the Legislature appertains wholly to the making of law.").

III. THIS COURT SHOULD AFFIRM THE TEMPORARY INJUNCTION, BECAUSE THE CIRCUIT COURT DID NOT ERRONEOUSLY EXERCISE ITS DISCRETION.

The circuit court "examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." *Sands*, 2008 WI 89, ¶13. That alone means this Court should affirm, without even "look[ing] for reasons to sustain a circuit court's discretionary determination." *Miller*, 2010 WI 75, ¶30 (citing *Sukala*, 2005 WI 83, ¶8).

The Legislature's complaints boil down to three. *First*, that LWV's theory is wrong on the merits. *Second*, that the

circuit court erred in weighing the relevant harms.[22] *Third*, that the circuit court failed to heed its warnings about the follow-on effects for laws that are not at issue in this case. All three complaints are unavailing. The merits are addressed in Section I above. The harms and the parade-of-horribles are addressed below.

A. The Harms Alleged Here Merit Injunctive Relief.

The Legislature's argument misapprehends this case. Nothing about LWV's suit turns on the *substance* of the actions taken at the December 2018 Extraordinary Session. The fundamental claim is that those actions are tainted by the Legislature's failure to obey the Constitution. So, LWV asked the circuit court for an injunction to address the Legislature's departure from *constitutionally mandated procedure* in convening the December 2018 Extraordinary Session. *See,*

[22] Under the temporary-injunction standard, there is no balancing of competing harms. *See Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 519-20, 259 N.W.2d 310 (1977) (cited by all parties and circuit court below).

e.g., *Stitt*, 114 Wis. 2d at 368-69 (legislative actions that violate the Constitution must be invalidated).

The circuit court focused on the "irreparable harm to a constitutional democracy such as ours" caused by "enforcement of laws that do not exist." (B-App013) This is a significant harm that itself justifies injunctive relief. Additionally, LWV (and Governor Evers) detailed extensive harms arising from the unlawful December 2018 Extraordinary Session. (B-App133-151, 158-163, 181-183, 254-260; R.45-53, 63) It is settled law that the taxpayer harm alone alleged here "forms good ground for ... an injunction," *Willard v. Comstock*, 58 Wis. 565, 571-72, 17 N.W. 401 (1883), to ensure the Legislature cannot "with impunity violate the constitutional limitations of its powers," *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 878-79, 419 N.W.2d 249 (1988) (quoting *Columbia Cty. v. Bd. Of Trs. Of Wis. Ret. Fund.*, 17 Wis. 2d 310, 319, 116 N.W.2d 142 (1962)).

B. The Legislature's Overblown Fears Are Not an Argument for Vacating the Injunction.

The Legislature's opening merits brief suggests that "some of the most important laws in this State" are implicated here. (Br. at 8) While this shows more restraint than prior briefs (*e.g.*, B-App227 (invoking "chaos" and "rolling disaster")), it is equally irrelevant.

As a matter of principle, laws adopted through an unconstitutional procedure cannot be enforced, "regardless of the consequences." *Isenring*, 109 Wis. at 29. This echoes the Court's focus on interpreting constitutional and statutory text, not "extrinsic ramifications of [the resulting] construction." *Milw. Dist. Council 48*, 2019 WI 24, ¶18. "All the mischiefs that flow from unconstitutional enactments lie at the doors of those who are charged with the duty to make laws." *Isenring*, 109 Wis. at 29. If the Legislature can excuse unlawful actions by fearmongering about the consequences of remedying its noncompliance, it is no longer subject to constitutional constraints.

As a matter of practicality, the challenge here does not extend beyond the results of the December 2018 Extraordinary Session, and the ramifications need not extend any further either. Many—if not most—laws passed through prior extraordinary sessions have no vulnerability because they ratified contracts since lapsed, appropriated funds now spent, created statutory provisions subsequently ratified, promulgated legislative districts later redrawn, etc. With respect to those measures that might still invite attack, courts would have options to limit the repercussions of a ruling here, including importing a limitation period and applying laches, estoppel, or reliance principles.

Further, if this Court is concerned about the ripple effects of a ruling for LWV here, it can invoke established precedent to make its ruling nonretroactive. *See, e.g.*, *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶¶46-49 & n.12, 301 Wis. 2d 178, 732 N.W.2d 804. All three factors this Court has enunciated are met here:

(1) "the decision [will] establish[] a new principle of law … by deciding an issue of first impression";

(2) "retroactive application would not further the operation of the new rule," given that prior extraordinary sessions "have already occurred"; and

(3) "retroactive application could produce substantial inequitable results" by "jeopardiz[ing] the legitimacy of past actions."

Id., ¶¶47-48 (citing *Wenke v. Gehl Co.*, 2004 WI 103, ¶71, 274 Wis. 2d 220, 682 N.W.2d 405).

The nonretroactivity doctrine exists to address concerns like those the Legislature raises here (their exaggeration notwithstanding). It ensures that legal mistakes do not persist indefinitely merely because they have already created a mess sufficiently large that it may be hard to clean up completely.[23]

CONCLUSION

For the reasons stated above, this Court should affirm the circuit court's order and lift the stay imposed by the court of appeals.

[23] Notably, while the Legislature has hyperventilated in court about the mess it foresees, it has taken no steps to mitigate the problem, though it—exclusively—possesses the tools to do so.

Dated: April 30, 2019

By: _____

Jeffrey A. Mandell (State Bar No. 1100406)
Kurt M. Simatic (State Bar No. 1083460)
STAFFORD ROSENBAUM LLP

Deana K. El-Mallawany*
Ben Berwick*
THE PROTECT DEMOCRACY PROJECT, INC.

Lawrence S. Robbins*
Carolyn Forstein*
Wendy Liu*
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP

Attorneys for Plaintiffs-Respondents

* Admitted *pro hac vice*

Addresses:

STAFFORD ROSENBAUM LLP
222 West Washington Avenue, Suite 900
Post Office Box 1784
Madison, Wisconsin 53701-1784
Email: jmandell@staffordlaw.com
ksimatic@staffordlaw.com
608.256.0226

THE PROTECT DEMOCRACY PROJECT, INC.
125 Walnut Street, Suite 202
Watertown, MA 02472
Email: deana.elmallawany@protectdemocracy.org
ben.berwick@protectdemocracy.org
202.579.4582

ROBBINS, RUSSELL, ENGLERT, ORSECK,
UNTEREINER & SAUBER LLP
2000 K Street NW, 4th Floor
Washington, DC 20006
Email: lrobbins@robbinsrussell.com
cforstein@robbinsrussell.com
wliu@robbinsrussell.com
202.775.4500

CERTIFICATION

I certify that the foregoing brief conforms to the rules contained in Wis. Stat. § (Rule) 809.62(4) and § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The Introduction and the portions of this brief referred to in Wis. Stat. § (Rule) 809.19(1)(d), (e), and (f) contain 10,820 words.

Dated: April 30, 2019.

Jeffrey A. Mandell

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic copy is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Jeffrey A. Mandell